1994

Alvan and Karen B. Strasrypka v. Bryon J. Wilson, Clella F. Glazier, CFG Investment Co., Westport Funding Co., and John Does One Through Five : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

ALVAN STRASRYPKA and KAREN B. STRASRYPKA, Plaintiff/Appellant, vs. BYRON J. WILSON, CLELLA F. GLAZIER, CFG INVESTMENT CO., WESTPORT FUNDING CO., and JOHN DOES ONE THROUGH FIVE Defendants/Appellees.	:	**APPELLANT'S BRIEF** Appeal No. 930620 Priority 16

APPEAL FROM A FINAL JUDGMENT OF THE THIRD DISTRICT COURT, SALT LAKE COUNTY, JUDGE GLENN K. IWASAKI PRESIDING.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j) (1992).

STATEMENT OF ISSUES

1. Issue: Did the district court err in granting Defendant's Motion for Partial Summary Judgment, ruling that "the only issue of any alleged default remaining for trial is whether or not the January 1991 and/or February 1991 payments were made or timely tendered"?

Standard of Review: An appellate court accords "no deference to the trial court's conclusions that the facts are not in dispute nor the court's legal conclusions based on those facts." Western Farm Credit Bank v. Pratt, 860 P.2d 376, 377 (Utah

App. 1993); Kitchen v. Cal Gas Co., Inc., 821 P.2d 458, 460 (Utah App. 1991), cert. denied 832 P.2d 476 (1992). All relevant facts, including all inferences arising from such facts, shall be construed in a light most favorable to the losing party. Kitchen, 821 P.2d at 460. "If, after a review of the record, it appears that there is a material factual issue, [an appellate court] is compelled to reverse the trial court's grant of summary judgment. Amica Mutual Insurance Co. v. Schettler, 768 P.2d 950, 957 (Utah App. 1959). "One sworn statement under oath [involving a material fact] is all that is necessary to create a factual issue, thereby precluding the entry of summary judgment." Id.

Furthermore, inasmuch as a challenge to summary judgment presents for review conclusions of law only, because, by definition, summary judgments do not resolve factual issues, this court reviews those conclusions for correctness, without according deference to the trial court's legal conclusions." Bonham v. Morgan, 788 P.2d 497, 499 (Utah 1989); Madsen v. Borthick, 769 P.2d 245, 247 (Utah 1988); Daniels v. Deseret Fed. Sav. & Loan Ass'n, 771 P.2d 1100, 1101-02 (Utah App.), cert. denied, 783 P.2d 53 (Utah 1989); accord Transamerica Cash Reserve, Inc. v. Dixie Power & Water, Inc., 789 P.2d 24, 25 (Utah 1990); Barber v. Farmers Insu. Exch., 751 P.2d 248, 251 (Utah App. 1988).

2. Issue: Did the district court abuse its

discretion in awarding the Defendant attorney fees in the amount of $20,673.25 and costs in the amount of $503.50?

Standard of Review: The award of attorney fees is within the sound discretion of the trial court and will not be overturned absent a clear abuse of discretion. Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988).

A trial court's award of costs is likewise reviewed under an abuse of discretion standard. Nielson v. Nielson, 826 P.2d 1065 (Utah App. 1991).

3. Issue: Did the district court err in concluding that the Plaintiff was a breaching (defaulting) party under the uniform real estate contract, thus making the award of attorney fees inappropriate?

Standard of Review: An appellate court reviews the trial court's conclusions for correctness and accords no particular deference to such conclusions. Western Kane County Special Service District No. 1 v. Jackson Cattle Co., 744 P.2d 1376, 1378 (Utah 1987).

DETERMINATIVE LAW

1. Utah R. Civ P. 56(c)

> The [summary] judgment sought shall be rendered

> forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

On June 7, 1991, Alvan and Karen Strasrypka, the fee owners of certain real property located in Salt Lake County, filed a complaint to foreclose on the subject property after the Defendants failed to make payments and provide proof of insurance on said property pursuant to the uniform real estate contract between the parties. (R. 2-6). Following, the Defendant's answer and counterclaim (R. 20-28), the Defendant filed a motion for summary judgment that the contract was not in default and that the Plaintiffs had waived any right to require the Defendant to provide proof of insurance. (R. 44-45). That motion was denied. (R. 172-74.). After significant discovery by both parties, the Defendant filed a motion for partial summary judgment, seeking a summary determination that the only issue remaining for trial was whether the January and February 1991 payments due under the contract were timely made. (R. 280-81). That motion was granted. (R. 374-75). Following a trial on March 16, 1993, the district court entered

findings of fact, conclusions of law, and judgment, dismissing Plaintiffs' cause of action and awarding judgment against Plaintiffs in the amount of $21,664.73. (R. 447-59). Plaintiffs' appeal from the judgment. (R. 466-67).

STATEMENT OF THE FACTS

The Plaintiffs, Alvan and Karen Strasrypka, are the joint owners of property located in Salt Lake County, State of Utah. (R. 96, ¶ 1). Prior to 1991, the Plaintiffs received monthly payments in the amount of $95.00 for the purchase of said property pursuant to a uniform real estate contract. (R. 96, ¶ 2). During this time, the Plaintiffs were consistently informed that the subject property was insured as required under the contract. (R. 96, ¶ 2).

Some time prior to 1991 and without any knowledge by the Plaintiffs, the uniform real estate contract was assigned to Clella Glazier. (R. 97, ¶ 3). The $95.00 monthly payment was consistently late. (R. 97, ¶ 3).

Plaintiffs did not receive the January 1991 or the February 1991 payments under the contract, therefore, on or about February 15, 1991, Plaintiffs phoned Ms. Glazier to inquire when the respective payments would be received. (R. 97, ¶ 4). At that

time, Ms. Glazier informed the Plaintiffs that she had sold the property on or about January 31, 1991, again without any notice to the Plaintiffs. (R. 97, ¶ 4). The Plaintiffs were directed to contact Western States Title Company inasmuch as they were the closing agent. (R. 97, ¶ 4). Plaintiffs immediately contacted Western States Title, however, were informed that the title company was unaware of any such transaction. (R. 97, ¶ 5).

Sometime thereafter, on or about February 25, the Plaintiffs received a call from someone representing themselves as the closing agents on the subject property. (R. 97, ¶ 6). The Plaintiffs informed the caller of the payoff amount on the contract, and also that the January 1991 and February 1991 contract payments had yet to be received. (R. 98, ¶ 6). On or about March 15, 1991, the Plaintiffs received a check from Western States Title Company, No. 24606, dated February 26, 1991, and mailed in an envelope postmarked March 12, 1991. (Plaintiffs' exhibits 4 and 5). The notation on the check indicated that it was for the January contract payment. (Plaintiffs' exhibit 4). Plaintiffs never received any payment prior to the February 26, 1991 check. (R. 100 ¶ 15).

Upon receipt of the February 26, 1991 payment, the Plaintiffs phoned Western States Title and informed them that they would not accept the payment inasmuch as they had yet to receive

any payment for January 1991. (R. 98, ¶ 8). Thereafter, on or about March 22, 1991, Plaintiffs forwarded check no. 24606 from Western States Title Company to their attorney who returned the check to the title company. (R. 98, ¶ 9).

On April 2, 1991, after no further response by the Defendants, the Plaintiffs mailed, by certified mail, a notice of default to Byron J. Wilson, the only party in privy with Plaintiffs, declaring the entire unpaid balance under the contract due and payable pursuant to paragraph 16 of the uniform real estate contract, which provides, in pertinent part:

> In the event of a failure to comply with the terms hereof the Buyer, or upon failure of the buyer to make any payment or payments when the same shall become due, or within thirty (30) days thereafter, the Seller, at his option shall have the following alternative remedies:
>
> > C. The Seller shall have the right, at his option, and upon written notice to the Buyer, to declare the entire unpaid balance hereunder at once due and payable, and may elect to treat this contract as a note and mortgage, and pass title to the Buyer subject thereto, and proceed immediately to foreclose the same in accordance with the laws of the State of Utah, and have the property sold and the proceeds applied to the payment of the balance owing including costs and attorney

> fees; and the Seller may have a judgment for any deficiency which may remain. In the case of foreclosure, the Seller hereunder, upon the filing of a complaint, shall be immediately entitled to the appointment of a receiver to take possession of said mortgaged property and collect the rents, issue any profits therefrom and apply the same to the payment of the obligation hereunder, or hold the same pursuant to the order of the court; and the Seller, upon entry of judgment of foreclosure, shall be entitled to the possession of the said premises during the period of redemption.

(R. 9-10 and Plaintiffs' Exhibit 1).

Plaintiffs received no response to the notice of default nor any communication whatsoever regarding the contract; thence on May 15, 1991, Plaintiffs mailed, by certified mail, a notice to all possible interest-holders in the property, including Westport Funding, informing them of the default under the contract. Thereafter, on May 30, 1991, an attorney for Westport Funding contacted Plaintiffs' counsel inquiring about the status of the contract. (R. 310). Following that conversation, on June 4, 1991, Plaintiffs' counsel received a letter and two checks dated June 4, 1991 from Equities Management which purported to be the contract payments for the months of March, April, May and June 1991.

(Plaintiffs' Exhibit No. 11). However, inasmuch as Plaintiffs had previously filed the notice of default due to Defendants' failure to pay the January and February contract payments within 30 days of the due dates, Plaintiffs declined the payments.

On June 7, 1991, the Plaintiffs filed a complaint to foreclose the uniform real estate contract pursuant to Utah law. (R. 2-7). Prior to trial, on or about January 29, 1993, the Defendant moved for partial summary judgment, seeking a determination that the only issue for trial was whether the January 1991 and February 1991 payments under the contract were timely made. The district court granted that motion. Subsequently, on March 16, 1993, the matter was tried. Following trial, the court entered findings of fact, conclusions of law, and judgment, dismissing Plaintiffs' cause of action and awarding judgment against Plaintiffs as follows:

a. $487.98 damages;

b. $20,673.25 attorney fees; and

c. $503.50 costs.

(R. 447-59). Plaintiffs' appeal from the judgment. (R. 466-67).

SUMMARY OF THE ARGUMENTS

1. The Defendant at issue in this case did not receive any notice of default until on or after May 15, 1991 and failed to make any payments to the Plaintiffs under the contract until on or about June 4, 1991. Accordingly, Defendant's failure to pay the March 1991 and April 1991 payments until after the default period constituted a default under the contract and the district court erred in granting Defendant's Motion for Partial Summary Judgment, ruling that "the only issue of any alleged default remaining for trial is whether or not the January 1991 and/or February 1991 payments were made or timely tendered."

2. Inasmuch as there remains disputed material issues of fact which, as a matter of law, should have precluded the entry of summary judgment for the months of March and April, the award of attorney fees and costs must be reversed until such time as a final determination can be made as to that issue.

3. Under the express terms of the uniform real estate contract, a defaulting party is liable for all costs, including reasonable attorney fees, arising from enforcement proceedings. In the case at bar, the Plaintiffs did not default under the contract to justify the award of attorney fees and costs. Accordingly, the district court abused its discretion in awarding Defendants attorney fees in the amount of $20,673.25 and costs in

the amount of $503.50.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS MOTION FOR PARTIAL SUMMARY JUDGMENT, RULING THAT "THE ONLY ISSUE OF ANY ALLEGED DEFAULT REMAINING FOR TRIAL IS WHETHER OR NOT THE JANUARY 1991 AND/OR FEBRUARY 1991 PAYMENTS WERE MADE OR TIMELY TENDERED."

It is elementary that summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ron Case Roofing & Asphalt Paving Inc. v. Blomquist, 773 P.2d 1382, 1385 (Utah 1989); accord Western Farm Credit Bank v. Pratt, 860 P.2d 376-77) (Utah App. 1993). Moreover, "unless there is a showing that the disfavored parties cannot produce evidence which would reasonably support a finding in their favor on a material or determinative issue of fact, a summary judgment is erroneous." Bridge v. Backman, 353 P.2d 909 (Utah 1960); accord Krantz v. Holt, 819 P.2d 352 (Utah 1991); Billings v. Union Bankers Ins. Co., 819 P.2d 803 (Utah 1991).

In the instant case, the district court granted Defendant's motion for partial summary judgment, ruling that "the only issue of any alleged default remaining for trial is whether or not the January 1991 and/or February 1991 payments were made or

timely tendered." However, because there was sufficient evidence before the district court that March 1991 and April 1991 payments were likewise at issue, the court erred in granting summary judgment.

In moving for partial summary judgment, Defendant, Westport Funding, claimed that Plaintiffs' action was limited to the months of January 1991 and February 1991 inasmuch as the complaint only referenced the April 2, 1991 default notice. However, such position is wholly inconsistent inasmuch as it is irrefutable that the first notice of any default received by Westport Funding was that notice dated May 15, 1991.[1] Accordingly, at the time of such notice, the payments for the months of March 1991 and April 1991 were not only at issue, but according to Plaintiffs' sworn affidavit, such payments had not been received. Further proof that the payments for March and April 1991 were at issue was the actual check that was ultimately issued to the Plaintiff for the months of March 1991 and April 1991 which was dated June 4, 1991, long after the running of the contractual grace

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[1] See Affidavit of Duane Cutler at ¶ 4 and Defendant's consolidated memorandum in support of motions to set aside receiver and for summary judgment at ¶ 10.

The uniform real estate contract does not specify the required form of notice, consequently, the May 15, 1991 notice constituted effective notice of default to Westport Funding, the only defendant at issue in this case.

period. Accordingly, because Plaintiffs' sworn statements and the actual check for the months of March and April 1991 were effectually the only direct evidence that such payments had not been timely made[2], summary judgment as to all months but January 1991 and February 1991 was entirely inappropriate.

Defendant, Westport Funding, further argued in support of its motion for summary judgment that it was not required to tender any monies subsequent to the April 2, 1991 default notice inasmuch as it would have been a futile act, citing Home Owners' Loan Corp. v. Washington, 161 P.2d 355 (Utah 1945). Again, however, such position is particularly inconsistent under the facts of this case.

As provided heretofore, Defendant did not receive any notice as to the default under the contract until on or after May 15, 1991. Consequently, as demonstrated by the record herein, at that time the Defendant could not possibly have known that tender of any payments, let alone those for March and April, which were already in default, would constitute a futile act. Home Owners'

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[2] Defendant's affidavits in support of summary judgment merely state that Westport had tendered the payments due under the Contract for March, April, May and June 1991. See Affidavit of Duane Cutler at ¶ 7. However, such payments were not tendered until on or about June 4, 1991, approximately one month after Defendant received the default notice.

Loan Corp. v. Washington, 161 P.2d 355, 358 (Utah 1945).[3] Based on the foregoing, summary judgment should be reversed to allow the Plaintiffs to offer evidence regarding Defendant's default for those months under the contract[4].

II. BECAUSE SUMMARY JUDGMENT WAS NOT WARRANTED IN THIS CASE, THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING THE DEFENDANT ATTORNEY FEES AND COSTS.

In the case at bar, the district court awarded the Defendant attorney fees in the amount of $20,673.25 and costs in the amount of $503.50. However, because there are disputed issues

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[3] In fact, the basis for Defendant's motion for summary judgment on this point was Mr. Strasrypka's deposition that he would not accept anything but full payment. However, Mr. Strasrypka was not deposed until December 2, 1992, over one and one-half years after the payments were due. Accordingly, aside from that, there was no evidence that the Defendants at issue had any notion that their tender of payments to Plaintiffs would have been a futile act.

[4] Clearly Defendant's claim that the timeliness of the default notice barred any action for default subsequent to the month of February 1991 fell short of satisfying the threshold burden that Plaintiffs could not produce sufficient credible evidence to reasonably support a finding in Plaintiffs' favor as to whether Defendants were in default for nonpayment for the months of March 1991 and April 1991, Bridge v. Backman, 353 P.2d 909 (Utah 1960); accord Krantz v. Holt, 819 P.2d 352 (Utah 1991); Billings v. Union Bankers Ins. Co., 819 P.2d 803 (Utah 1991), particularly in light of the fact there was considerable evidence to preclude summary judgment on that issue.

of fact as to whether the Defendant defaulted under the contract for failure to make payments under the contract for the months of March 1991 and April 1991, the award of attorney fees must be reversed until such determination is settled.

III. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE PLAINTIFF WAS A BREACHING (DEFAULTING) PARTY UNDER THE UNIFORM REAL ESTATE CONTRACT, THEREFORE THE AWARD OF ATTORNEY FEES WAS NOT LEGALLY JUSTIFIED.

This court has stated that "if provided for by contract, the award of attorney fees is allowed only in accordance with the terms of the contract." Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988) (citing Trayner v. Cushing, 688 P.2d 448, 450 (Utah 1984).

In the present case, paragraph 21 of the contract between the parties provides:

> The Buyer and Seller each agree that should they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise.

Accordingly, in order for attorney fees to be awarded against the Plaintiff, the district court must conclude that the Plaintiff defaulted under the terms of the contract. Here, the court first ruled that:

> 6. The plaintiffs' declaration of acceleration and attempted foreclosure of the contract is a breach of that contract.

The above conclusion lacks basis in fact and law inasmuch as the Plaintiff proceeded pursuant to express terms of the uniform real estate contract which prescribed that in the event the Defendant had not made a payment within thirty (30) days, the party had the absolute option of declaring acceleration. In this case, the January 1991 payment was in default anytime after February 14, 1991 (30 days after January 15). Not only did the Plaintiffs maintain at trial that they never received the alleged February 14, 1991 payment, even the Defendant's witnesses testified that such payment was not mailed until a few days after February 14, 1991.[5] Accordingly, where defendant had an absolute right under the contract to declare acceleration, the court erred in

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[5] See Transcript at pp. 111 and 129; see also transcript of the ruling.

concluding that he breached the contract for doing so.[6]

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[6] Even the court in its ruling acknowledges that acceleration was legally justified, although not equitably justified. The court stated:

> Now, I have indicated even though in the best light to the defendant, if tender were as I have indicated is my holding, if the payments were tendered, they were still late. But does that constitute a breach under these circumstances where acceleration could then be justified pursuant to the uniform real estate contract as evidenced by P-1? Mr Wilson, as he correctly stated many times, that forfeiture then becomes a question of equity. And it is my opinion that equity would forbid me from allowing the acceleration of this contract based upon questionable $95 missed payments. Even though they were, as I indicated tendered, but late, they were late only on the February payment--excuse me, on the January payment. They were late only by one or two days.

Transcript of ruling at 10-11.

Based on the foregoing, while equitable principles may have barred acceleration by Plaintiff, neither legal or equitable principles direct that the Plaintiffs, who simply proceeded pursuant to the explicit language of the contract, were defaulting or breaching parties under the contract so as to have attorney fees awarded against them.

The court also concluded that:

> 8. Plaintiffs' actions in taking over the property constitute a breach of the contract between the parties.

In the instant case, the court's ruling presupposes that the Plaintiff employed self-help measures in taking over the subject property.[7] However, as reflected in the record, Plaintiffs employed appropriate legal means, filing a motion to appoint a receiver on or about June 11, 1991 based on the complaint filed previously on June 7, 1991.[8] Pursuant to the substantiated allegations set forth in the complaint, Judge Daniels determined that appointment of a receiver was warranted and ordered the same.[9] Based on that, it is beyond the prerogative of the district court to now determine that the Plaintiffs breached the contract by seeking and receiving judicial redress notwithstanding the ultimate outcome of the proceedings.

Based on the foregoing, the district court erred in concluding that the Plaintiffs breached the uniform real estate

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[7] See Findings of fact and conclusions of law.

[8] Counsel for the Defendant argued below that the motion to appoint a receiver was ex-parte and therefore inappropriate. However, as reflected in the record, the motion was filed on June 11, 1991 and Defendant's counsel did not enter her appearance until on or about July 3, 1991.

[9] R. at 16-17.

contract between the parties. Further, because Plaintiffs did not breach the contract and since attorney fees can only be awarded against a defaulting or breaching party thereunder, the court abused its discretion in awarding attorney fees and costs to the Defendant.

CONCLUSION

Based on the foregoing, Plaintiffs request that this Court reverse the ruling of the district court that the Plaintiffs defaulted under the uniform real estate contract so as to entitle the Defendant to an award of attorney fees. In the alternative, Plaintiffs seek a reversal of the court's partial summary judgment, necessitating remand of this case to the district court for further proceedings to determine whether there was a default for the months of March 1991 and April 1991.

DATED this 1 day of May, 1994.

NOLAN J. OLSEN
Attorney for Defendant/Appellee

CERTIFICATE OF MAILING

I hereby certify that on the 9 day of May, 1994, I mailed a true and correct copy of the foregoing BRIEF OF APPELLANT, postage prepaid thereon, addressed to the following:

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ADDENDUM

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ALVAN STRASRYPKA and KAREN B. STRASRYPKA, Plaintiffs, vs. BYRON J. WILSON, CLELLA F. GLAZIER, CFG INVESTMENT CO., WESTPORT FUNDING CO., and JOHN DOES ONE THROUGH FIVE,	ORDER GRANTING DEFENDANT WESTPORT'S MOTION FOR PARTIAL SUMMARY JUDGMENT Civil No. 91-0903626-PR Judge Glenn S. Iwasaki

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Defendant Westport Funding Company's Motion for Partial Summary Judgment having come on before the court for oral argument on the 10th day of March, 1993, the Hon. Glen S. Iwasaki presiding, defendant Westport Funding being represented by its counsel Leslie Van Frank of and for COHNE, RAPPAPORT & SEGAL, P.C., plaintiffs being represented by their counsel Donald Wilson of and for WILSON & WILSON, the court having reviewed the pleadings filed in support of and in opposition to the Motion for Partial Summary Judgment,

having heard the argument of counsel, and good cause appearing therefore,

IT IS HEREBY ORDERED that defendant's motion is granted, and the court hereby determines that the only issue of any alleged default remaining for trial is whether or not the January 1991 and/or February 1991 payments were made or timely tendered.

DATED this 16th day of March, 1993.

BY THE COURT:

Hon. Glenn K. Iwasaki

APPROVED AS TO FORM:

WILSON & WILSON

Donald R. Wilson
Donald Wilson
Attorneys for plaintiffs

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * *

ALVAN STRASRYPKA and KAREN B. STRASRYPKA, Plaintiffs, vs. BYRON J. WILSON, CLELLA F. GLAZIER, CFG INVESTMENT COMPANY, WESTPORT FUNDING COMPANY, and JOHN DOES ONE THROUGH FIVE, Defendants.	CASE NO. 910903626 PR

* * * * *

BEFORE THE HONORABLE GLENN K. IWASAKI

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

(Ruling of the Court)

SALT LAKE CITY, UTAH

MARCH 16, 1993

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SALT LAKE CITY, UTAH; MARCH 16, 1993; A.M. SESSION

THE COURT: Thank you, Mr. Wilson.

I have a firm grasp of the testimony in this matter. I would like to take some time to review the 36 exhibits that have been received in this. I intend to render a decision today so no one will have to go away thinking about what my decision will be. We will be in informal recess until I notify you all that I am ready to render a decision. Please just hang around.

We will be in informal recess until then.

(Informal recess taken.)

THE COURT: We are back in session after informal recess to allow me time to consider the evidence in this matter.

To begin with, I want to thank counsel for the manner in which the evidence was presented. It wasn't a complicated case but I do appreciate the manner in which the counsel were accommodating to each other to the Court and the presentation of the evidence.

As I review the facts of this case, it is clear that the issues that I have to consider is whether or not there was a payment that was tendered for the months of January and February of 1991 to the plaintiffs by the defendant. And if their answer to that was yes, then the next question is were they ever received by the defendant?

And then if they wasn't ever received by the defendant--excuse me. If it was never received by the plaintiff, then was the defendant responsible for the payment, either nontendered, or not paid, or not received by the plaintiff in this matter.

There has been considerable conflict regarding testimony as to the plaintiff, Mr. Alvan Strasrypka, regarding whether or not he had ever received checks in question. Ever received checks in question. The exhibits in question are evidenced by Exhibit Number P-4 and the first check attached to Defendant's Exhibit D-22.

While there is conflict as to whether he has received those, or the time in which he received them, or the manner in which he received them, there is also conflict regarding the check of Clella Glazier, dated January 1st, 1991, and whether or not that was for a December 1990 payment, or for a January 1991 payment.

It seems to be no question that the uniform real estate contract in question here, that being P-1 indicated there was a $95 payment due on the 15th of every month and the 30-day grace period given thereto.

That 30-day grace period becomes problematic in the analysis of the facts, as well as the presentation of the facts, for it overlaps and it becomes confusing as to which payment was being--whether it was actually received,

was for whatever date it was, whether it was for the present month or the preceding month. But regardless of which, that's what the terms of the contract says.

Furthermore, it does indicate that if, in fact, there is a default in payments, that the plaintiff or the holder of the paper could accelerate the contract demand that all payments be accelerated, and in this case that was the election of the Strasrypkas in this matter, and they so informed all counsel--then informed all parties, pursuant to a notice on May of 1991, and that was D-14. Correct me if I am wrong on that counsel.

To begin with, the check from Clella Glazier, dated January 1 of 1991, while there is conflict as to her admissions versus an affidavit to resolve that, I looked to other evidence, and it is unquestioned that in the ten years plus that the plaintiffs were receiving payments from Mrs. Glazier, it indicated that she always made the payments, or generally made the payments around the second or the fifth of every month, and that was for the preceding month' rent, and that she was never late, meaning never paid after the grace period had expired.

In semantics, what we are talking about is whether a payment was late, it is my view and I so hold that a late payment would be those payments that were received or paid after the expiration of the grace period.

That is a late payment.

Whether or not Mrs. Glazier ever made any late payments, it is my holding that she did not, although they were not exactly on the 19th of every month. Pursuant to my definition of what is a late payment, she was never late. Her course of habit and custom was, she would tender payments on the first or second or by the fifth of every month. It is consistent with the January 1st payment of 1991 being made payable on the December 1990 payment.

With that out of the way we have to look at whether or not there were payments for the months of January and February of 1991. During that time the property in question was under sale. The Westport Funding, through Mr. Cutler, was purchasing this property; did in fact. And there is no question that there was negotiated arrangement meetings and final settlement of that purchase. And that was done by and through Western States Title.

The settlement statements, as evidence by D-25, indicating buyers and settlement payments, that being two pages, show that in fact on that area or that time in question there was settlement that had gone through Western States Title, and that certain amounts of money were designated and certain checks were cut pursuant to the settlement.

When there is a conflict in the evidence between

the principals, I must then have to look toward independent evidence, if any there be, regarding what position that I should take. I rely very heavily upon the testimony of Lori Pimm and that of Michelle Wallace regarding their understanding and their course of conduct concerning the settlement at this time.

Defendant's Exhibit D-22, that being the balance sheet, indicates that there was on 2-14-91 a check cut for $95 payable to the plaintiff in this matter, and on the face of the Defendant's D-22, it indicates there was a February contract payment. That is further evidenced by the first check in D-22 dated 2-14-91 on the account of Western States Title made may able to the plaintiff in the amount of $95.

It is true that there is no documentation but rather testimonial evidence from Michelle Wallace regarding conversation that she had with the plaintiff, Alvan Strasrypka, regarding the receipt of these funds.

In order for me to disbelieve her, I would have to be convinced there was some sort of general conspiracy among those people at Western States, particularly Pimm and Wallace, as well as Cutler, who conspired together to concoct this story, that in fact checks and--and go to the extent of copying nonexistent checks, if any there be, would go to the extent of having me to believe that she was

lying, to show there was a general conspiracy among those parties to somehow not pay the plaintiff a $95 payment when in fact we are talking about a closing that included $200,000 in total property, of which this property in question was just a small amount. I do not reach that point.

I am not convinced by my analysis of the evidence that Ms. Wallace is lying to this court or that she is somehow lying to support some position that she may have. She is an independent witness as far as I'm concerned. Western States is out of business. She has no tie. It has been indicated to Mr. Cutler--even Lori Pimm, who's other name is Cutler, is not related to Mr. Cutler. That was made clear by Ms. Van Frank--but she would also have to be a party to this conspiracy to keep $95 payment away from the plaintiff.

If there is no conspiracy, and if I receive at face value that the plaintiff never received these monies, which there seems to be some question about, then there has to be some negligence on the part of Western States, because it is undoubtedly--there is no question that it was not Mr. Cutler who had made arrangements to make the payment of the February '91 payment, but rather that came out of the closing.

Now whether or not any negligence of Western

States not to timely make the payment to the plaintiff should go to the benefit of the plaintiff and in that way it would go to his benefit, if I find there was a breach of the contract and therefore allow acceleration or should the defendant, Westport, Mr. Cutler be held responsible for whatever negligence of not mailing those checks out, the testimony was custom and habit indicates that at the end of the close goes checks would be made out. As indicated by D-22, the first check that was dated 2-14-91, that was, according to custom, mailed out that night or the night after. Even assuming that it was mailed out the night after, it would still be an untimely payment of the January payment because it was without the 30-day grace period. It was further then the 30-day grace period upon receipt by the plaintiff in this matter, Mr. Strasrypka.

On the other hand, question then comes up why would P-4, that being the check dated 2-26-91 ever be cut by Western States in the first place. The only logical explanation of that would be the telephone conversation that Ms. Wallace had with the plaintiff regarding the fact that he had received February's payment but where is January's payment.

Western States, without doing any other checking on a $95 check, paid it out. Paid it on 2-26-91. Once again, that is an untimely payment but it was tendered, and

the tender is, what is important here, and also, who is responsible for that tender is important to my analysis, for I reiterate that it was not Mr. Cutler that was responsible for the cutting of those checks. That was done during the whole closing. So what I am holding is there was tender of both the January and February payments and whether or not that was ever received by the plaintiff is another question.

If it was never received by the plaintiff, then whose responsibility is it for that non-payment? And in my estimation it was not on Mr. Cutler, but if there be any blame, that would be to Western States for not doing that.

Now, I have indicated even though in the best light to the defendant, if tender were as I have indicated is my holding, if the payments were tendered, they were still late. But does that constitute a breach under these circumstances where acceleration could then be justified pursuant to the uniform real estate contract as evidenced by P-1? Mr. Wilson, as he correctly stated many times, that forfeiture then becomes a question of equity. And it is my opinion that equity would forbid me from allowing the acceleration of this contract based upon questionable $95 missed payments. Even though they were, as I indicated, tendered, but late, they were late only on the February payment--excuse me, on the January payment. They were late

only by one or two days.

If you assume, which I will, that the 2-14 payment was for that date, and it is the 2-26 payment would only be late for the February--it wouldn't be late for the February payment because that wouldn't have been expired, the 30 days would not have expired until March 17th, I believe was Ms. Van Frank's time of 30 days, because February only has 28. So therefore, it then becomes an issue as to whether or not one or two days payment being late would give rise in equity to allow the acceleration and to determine that there was in fact a default of those payments.

It has been tendered and remains to be tendered and still I believe the funds are downstairs in the clerk's office, as to the rent in this matter that has not been paid, and it will be my order that that money be released and the payments of those missed months will be made up by releasing those funds. But I want to reiterate that the court is holding that equity prevents me from allowing an accelerated demand for a payment of $9,600 based upon my analysis that a tendering of the 2-14-91 date check for the January payment would be late by only a couple of days and I will not allow such draconian measure to be taken for a payment of that amount.

Where there has been some testimony of lying and

stealing and cheating in this case, I needn't reach that point and I don't impute any criminal interest nor criminal actions on the part of any parties in this matter.

As to anybody claiming equity of $20,000, once again I don't impute any criminal actions, however, the realities of such would be that if the equity in this property is $20,000, which is uncontroverted, then by virtue of a two or three dollar late payment, and if Mr. Cutler could not make the $9,600 payment, he would in effect be losing any equity that he had in that property. Whether or not that was equity that he had gained over years and years of making a $95 payment or as the truth in this matter is that he had gained by buying out the interest of Clella Glazier, remains to be irrelevant, but the end effect of which, if I allowed this matter, would be that he would lose $20,000 in equity based upon a factual three day missing of a payment for the January payment, and I refuse to do that.

Damages in this matter, as everyone indicates, is overwhelmingly attorneys fees. I will allow damages in the amount of $480 for the difference in which Westport could have done the services as indicated by Defendant's Number 18, that being the plaintiff's accounting, and what the plaintiff expended. So with that, $480 is awarded.

I am not awarding $880 in the increase rent

value. I'm not awarding any amount for the increase in rent value, even if it was $20. I am not convinced by the evidence that it was of a convincing enough nature that in fact rent increases were to be anticipated and were in fact going to occur to either amount, and I will not award that.

As to attorneys fees, I would request that Ms. Van Frank give me affidavits, give opportunity to Mr. Wilson to examine that, have him submit any objections that he may have. If necessary, we will take that up at an evidentiary hearing regarding the amount of attorneys fees and as indicated the amount of attorneys fees is the giant--giant part of the damages in this matter.

It appears that the defendant had no options, once placed in the corner--pushed in the corner of having to either pay $9,600 or forfeit the property in question, which had an estimated equity of $20,000. He had no recourse except to fight this matter. He had no recourse except to obtain counsel and to litigate it, to which today is the end result.

I don't blame either party for doing that. This seems to be the problem with the system. That we are talking about attorneys fees far in excess of the value of the property we are talking attorney fees far in excess of the accumulated payments that were ever made in this matter. And this is nothing but the court editorializing

as to the futility of having a trial in this instance concerning these types of issues with the amounts of attorneys fees that are involved. We are talking about $30,000 in attorneys fees and I find that to be appalling but I blame neither side.

I believe that the plaintiffs, pursuant to the technical reading of the contract, had the right to go forward once the discovery was more or less completed, though I believe there should have been some earnest compromise on both sides to resolve this case short of trial. It was not my ruling as I have stated.

Any questions as to what I have held so far?

MS. VAN FRANK: The only question I would have, your Honor, is time frame on communications of objection to the affidavit on fees, which I believe is here now. We can submit the affidavit to the Court right now and have a time frame as to objections.

THE COURT: How long, Mr. Wilson, do you think it will talk you to form any objections, and if necessary, to supply those to the Court?

MR. WILSON: Two weeks would be enough, your Honor.

THE COURT: All right. You will have until the 30th. Give him a copy of those today and he will have until the 30th to makes objections.

MS. VAN FRANK: Would you like us to submit those now, the affidavit itself now?

THE COURT: Yes. You can make that part of the file and give a copy to Mr. Wilson.

Have I left anything out? No punitive damages were earnestly requested. No punitive damages are awarded.

MS. VAN FRANK: Thank you.

THE COURT: Anything else, Mr. Wilson?

MR. WILSON: Yes. You indicated that the payment is downstairs. What did you want done with those?

THE COURT: Well, I think that they have been made on a monthly basis, they have been accruing downstairs? I think they should be released to the Strasrypkas for the payments of the months that they had not received.

MS. VAN FRANK: It may makes sense, your Honor, to release the portion of them less at least the minimal 400 some odd dollars of damages that you have awarded, that it may make sense to just give Mr. Cutler his damages out of that, turn the rest on over to Mr. Wilson when his orders are all entered.

THE COURT: Do you have any objection to that?

MR. WILSON: I have no objection to that, your Honor, so that out of what is in there at this time, provided those are all of the payments that were due, we

would deduct the 480 from that?

THE COURT: That is correct

MR. WILSON: And with courts order I would withdraw that and make that $480 payment to counsel.

THE COURT: No, I think what she is saying is that she will keep $480 give you the rest out of money that is downstairs

MS. VAN FRANK: The Clerk of Court release the 480 to you, the rest would be released to me. We will continue to make timely payments.

MR. WILSON: Okay.

THE COURT: Or any other manner in which you all feel comfortable.

MR. WILSON: Maybe I better restate what you want done on that payment.

THE COURT: I am going to restate it. All the rents be paid to them. The $480 you pay it to them, then the downstairs does not have to get involved in any accounting or anything else like that.

MR. STRASRYPKA: Rent or contract payment?

MS. VAN FRANK: Contract payments.

THE COURT: Contract payment.

MS. VAN FRANK: If they haven't already been returned.

THE COURT: The haven't already been returned.

As I understanding, pursuant to D-18, I am just now ordering $480 more to be paid on that accounting, in essence.

MR. WILSON: And the balance?

THE COURT: Well there is no balance. The contract payments downstairs for the months this case has been pending will be turned over to you for the payments and assuming they are current, so I don't have to get into another default, let's hope they are all current. Now when you receive that, or whenever you cut a check to them for the $480--

MR. WILSON: That is okay. That's as I understood. That's what I was proffering.

THE COURT: Okay. Then as to objections, you will have until the 30th of March to file your objections. I will look at those and if I can rule on them without evidentiary hearing I shall. If not, then I will call you back in for an evidentiary hearing regarding the amount of reasonableness of fees.

MS. VAN FRANK: In the meantime, shall we prepared proposed findings and conclusions as far as the rest was concerned?

THE COURT: That was my last request of you, Ms. Van Frank, since you are the prevailing party in this matter, please submit draft findings and conclusions to Mr.

Wilson before you submit them to me.

I am sure you are going to have to get a copy of the transcript from the reporter.

MS. VAN FRANK: We'd appreciate that.

MR. WILSON: As is your ruling as to the existence of a contract, have you made a ruling as for that is the continuation of the contract?

THE COURT: Yeah, I mean you are all bound by the terms and conditions of the contract: $95 a month until it is paid off. I thought it interesting to look at the amortization that by the time it gets paid off sometime in 2006 or 2008 that extraordinarily high amount of interest has been paid on a $13,000 loan but that's another issue that I will take up another time.

Anything else all right? Nothing else then, we will be in recess.

REPORTER'S CERTIFICATE

STATE OF UTAH)
: SS.
SALT LAKE COUNTY)

I, NORA S. WORTHEN, an official court reporter for the Third Judicial District Court in and for Salt Lake County, State of Utah, do hereby certify that I reported stenographically the proceedings in the matter of ALVAN STRASRYPKA ET AL., VS. BYRON J. WILSON, ET AL., Case No. 910903626 PR, and that the above and foregoing is a true and correct transcript of said proceedings.

Dated this 25th day of March 1993.

Nora S. Worthen, CSR, RPR
Utah License No. 205

Leslie Van Frank (Bar No. 4913)
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Attorneys for Defendant
Westport Funding Company

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ALVAN STRASRYPKA and KAREN B. STRASRYPKA, Plaintiffs, vs. BYRON J. WILSON, CLELLA F. GLAZIER, CFG INVESTMENT CO., WESTPORT FUNDING CO., and JOHN DOES ONE THROUGH FIVE,	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 91-0903626-PR Judge Glenn K. Iwasaki

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The above entitled matter came on regularly for trial on the 16th day of March, 1993 before the Honorable Glenn K. Iwasaki, Judge, presiding, and sitting without jury. The plaintiffs were present and represented by Donald L. Wilson of WILSON & WILSON, Attorneys. The defendant Westport Funding Company was present by the presence of Duane Cutler, and represented by Leslie Van Frank of COHNE, RAPPAPORT & SEGAL, P.C. The defendant Byron J. Wilson was present but was not represented by counsel. No other defendants were present or represented.

The present parties, through their respective counsels, stipulated that the defendants Byron J. Wilson, Clella F. Glazier (deceased), C.F.G. Investment Co., and the remaining unnamed defendants, had no further interest in and to the property or in the proceedings and the cause of action against those individuals was dismissed.

The Court, by way of prior partial summary judgments, ruled that the contract in question was not in default by virtue of non-payment of or failure to provide for hazard insurance upon the premises or for any lack of loss payee assignment, and that the only issue of any alleged default remaining for trial by this Court was whether or not the January and February 1991 payments due under the Uniform Real Estate Contract that is the subject of this case were made or timely tendered. The Court, therefore, proceeded to hear the testimony of witnesses, accept and review exhibits proferred by the parties' counsels, heard arguments and proffers by counsel, and having been fully advised of the premises therein, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Alvan Strasrypka and Karen B. Strasrypka, the plaintiffs herein, are the record title owners of the real property that is the subject of this lawsuit, more particularly described as:

> BEGINNING at the Southwest corner of Lot 2, Block 73, Plat "C", Salt Lake City Survey, and running thence East

53.5 feet; thence North 90 feet; thence West 53.5 feet; thence South 90 feet to the point of BEGINNING.

SUBJECT TO A RIGHT OF WAY over the East 5 feet thereof, and together with a right of way 5 feet wide adjoining on the East side of said tract.

ALSO subject to a right of way over the West 1/2 rod thereof.

2. The plaintiffs' interest in the property is subject to a Uniform Real Estate Contract dated September 12, 1975, by and between A.A. Strasrypka and plaintiff Alvan Strasrypka as sellers and Byron J. Wilson as buyer (hereafter "Contract"). (Ex. P1)

3. Defendant Westport Funding Company is the assignee of the buyer's interest in the Contract, having obtained its interest in February 1991. (Tr. p. 79)

4. Westport Funding purchased its interest from C.F.G. Investment Company as part of a package of properties, the total sales price of which was in the $200,000.00 range. (Tr. pps. 121-22).

5. The Contract provides for a thirty (30) day grace period for payments. (Ex. P1)

6. Clella Glazier regularly mailed her payments to Alvan Strasrypka from the time Mr. Strasrypka's father died in 1980 for more than ten years. (Tr. p. 45).

7. Alvan Strasrypka accepted all such payments from Clella Glazier without objection to the method of delivery, i.e., mailing. (Tr. p. 45).

8. On or about January 1, 1991, Clella Glazier tendered a $95.00 check to Alvan Strasrypka, which check Mr. Strasypka accepted and cashed. (Tr. p. 21).

9. The January 1, 1991 check was for the payment that was due on December 15, 1990.

10. On February 14 or 15, 1991, Western States Title Company mailed a check dated February 14, 1991 in the amount of $95.00 to Alvan Strasrypka. (Page 2 of Ex. D22; Tr. 111, 118).

11. Alvan Strasrypka received the February 14 check from Western States Title. (Tr. pp. 112-13, 129).

12. After receiving the February 14 check, Mr. Strasrypka called the title company and complained that he was also owed the January payment. (Tr. pp. 112, 129).

13. In response to Mr. Strasrypka's complaint, the title company prepared another check, dated February 26, 1991 in the amount of $95.00 payable to Alvan Strasrypka, and mailed it to him on that day or on February 27, 1991. (Ex. P4; Tr. pp. 113). The funds for this check had come from the closing of another of the properties that Westport Funding was purchasing from C.F.G. Investment. (Tr. p. 114).

14. Western States Title Company had sufficient funds in its trust account to pay the February 14 and February 26 checks. (Tr. p. 115).

15. Several days after the February 26th check was mailed, Alvan Strasrypka again called the title company. This time he asserted that Mrs. Glazier could not assign the contract, and he wanted to be paid in full. (Tr. pp. 131-32).

16. On March 28, 1991, plaintiffs' attorney mailed the February 26 check back to the title company. (Tr. p. 31; Ex. P9)

17. Plaintiffs then asserted that there was a default under the contract, asserted an acceleration of the contract, and on April 2, 1991, mailed a Notice of Default to Byron Wilson. (Tr. pp. 27-28; Ex. P7).

18. At all times from and after April 2, 1991, the plaintiffs have refused tender of any payment except the full amount claimed as due under the terms of the contract. (R. ____ [Motion for Partial Summary Judgment]).

19. Prior to trial, a payment for each month from January 1991 to the date of trial had been tendered into court, and at the time of trial were being held by the clerk of the court pending further court order. (R. _____).

20. Prior to the opening of evidence at trial, defendant Westport's counsel proffered tender of all payments, from January

1991 to the date of trial, which tender plaintiffs refused. (Tr. pp. 9-10).

21. Sometime during May 1991, plaintiffs sent the tenants of the property notice that they had taken over and that all future rents were to be made to plaintiffs. (Ex. D19). Thereafter, and without the consent of Westport, plaintiffs collected June 1991 rents from the tenants. (Tr. p. 170; Ex. P11).

22. Although plaintiffs were aware that defendant Westport was represented by counsel, they approached the court ex parte and obtained an order appointing plaintiff Alvan Strasrypka as receiver of the property. (Exs. P11, P12, P13; R. ____). The plaintiffs did not tell the court that that they had already taken over the property by self-help, nor that they had failed to give notice to defendant Westport or its counsel of their motion to appoint Mr. Strasrypka as receiver. (R. _____).

23. After being appointed as receiver, Alvan Strasrypka continued to collect the rents, and from those rents paid himself $12.00 per hour for such tasks as mowing the lawn. (Ex. D18)

24. During his tenure as receiver, Alvan Strasrypka failed to pay the water bill for almost six months (Tr. pp. 173, 180-81; Ex. D18).

25. By its order dated April 13, 1992, this court vacated its previous order appointing Mr. Strasrypka as receiver. (R. _____).

26. From the $4,260.00 Alvan Strasrypka collected as rents from the property, he kept $1,270.76 before remitting the remainder to Westport on April 7, 1992. (Ex. D18)

27. The funds Mr. Strasrypka kept were expended as follows:

a. $317.14 was paid to utilities and $355.74 was paid for property taxes, for a total of $682.88. (Ex. D18)

b. The remaining $587.98 was disbursed to Alvan Strasrypka himself for parts, tools, mileage, and labor at the rate of $12.00 per hour. (Ex. D18)

28. Had Westport Funding been in possession of the property during Alvan Strasrypka's receivership, its out-of-pocket expenditures would have included the $682.88 for utilities and taxes, and $108.00 for maintenance and repairs. (Tr. pp. 182-83).

29. Westport would not have expended the extra $487.98 that Mr. Strasypka paid himself as receiver. (Tr. p. 182-86).

30. Westport had $20,000.00 equity in the property at the time the lawsuit was filed. (Tr. p. 189)

31. The principal balance of the Uniform Real Estate Contract after payment of the January 15, 1993 payment was in

excess of $9,600.00. (Ex. P2; R. ___ [Motion for Partial Summary Judgment]).

32. Despite plaintiffs' attempted acceleration, Westport Funding did not have the ability to pay the principal balance. (Tr. p. 87).

33. As of March 15, 1993, Westport Funding has incurred $14,221.50 in attorneys fees and $503.50 in recoverable costs in defending this action and in protecting its interest in the real property. The billing rates explained in the Affidavit of Leslie Van Frank are reasonable and within the market range of fees charged by other attorneys and paralegals in Utah with comparable qualifications and experience. The services indicated in the affidavit were reasonably and necessarily undertaken to defend against the plaintiffs' action and to recover the property from the plaintiffs' receivership. The sum of $14,221.50 is a fair and reasonable attorneys fee in this matter as of March 15, 1993.

34. Defendant Westport Funding is also entitled to its attorneys fees in the amount of $2,502.50, as established by Supplemental Affidavit of Leslie Van Frank, for the trial of this matter and the preparation of the Findings of Fact and Conclusions of Law, and to such additional attorneys fees incurred for post-trial proceedings to the time of entry of judgment, as shall be

established by affidavit. These fees were also reasonably and necessarily incurred in the defense of this case.

CONCLUSIONS OF LAW

1. Westport Funding Company is the assignee of the buyer's interest in the Uniform Real Estate Contract dated September 12, 1975.

2. Under the terms of the contract, if the payments were made more than 30 days after they were due, plaintiffs were entitled to declare an acceleration of the principal amount due, elect to treat the contract as a note and mortgage, and to foreclose the same in accordance with the laws of the State of Utah.

3. Plaintiffs declared acceleration on April 2, 1991.

4. A valid tender of all amounts due under the contract was made to the plaintiffs before April 2, 1991.

5. The valid tender of the payments cut off the plaintiffs' right to declare acceleration. (Homeowner Loan Corporation v. Washington, 161 P.2d 355, (Utah 1945).

6. The plaintiffs' declaration of acceleration and attempted foreclosure of the contract is a breach of that contract.

7. The contract was not in default for non-payment on April 2, 1991 or at any time thereafter.

8. Plaintiffs wrongfully took over the property by self-help and in violation of Rule 66, U.R.Civ.P.

9. Plaintiffs' actions in wrongfully taking over the property constitute a breach of the contract between the parties.

10. Plaintiffs' actions in taking over the property by self-help constitutes unclean hands.

11. Foreclosure is an equitable proceeding.

12. Equity prevents plaintiffs from foreclosing.

DATED this 15th day of November, 1993.

BY THE COURT:

Glenn K. Iwasaki
District Court Judge

JUDGMENT

FILED DISTRICT COURT
Third Judicial District

NOV 19 1993

SALT LAKE COUNTY
By _____ DEPUTY CLERK

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ALVAN STRASRYPKA and KAREN B. STRASRYPKA, Plaintiffs, vs. BYRON J. WILSON, CLELLA F. GLAZIER, CFG INVESTMENT CO., WESTPORT FUNDING CO., and JOHN DOES ONE THROUGH FIVE,	2187566 11-23-93 8:21am J U D G M E N T Civil No. 91-0903626-PR Judge Glenn K. Iwasaki

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The Court having entered its Findings of Fact and Conclusions of Law on the 15th day of November, 1993 regarding the trial of this matter,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. Plaintiff's cause of action against defendant Westport Funding Company is hereby dismissed, no cause of action.

2. Plaintiffs are awarded judgment against defendants Byron J. Wilson, Clella F. Glazier and C.F.G. Investment Company

declaring that those defendants have no interest in the following real property:

> BEGINNING at the Southwest corner of Lot 2, Block 73, Plat "C", Salt Lake City Survey, and running thence East 53.5 feet; thence North 90 feet; thence West 53.5 feet; thence South 90 feet to the point of BEGINNING.
>
> SUBJECT TO A RIGHT OF WAY over the East 5 feet thereof, and together with a right of way 5 feet wide adjoining on the East side of said tract.
>
> ALSO subject to a right of way over the West 1/2 rod thereof.

3. The Uniform Real Estate Contract dated September 12, 1975, by and between A.A. Strasrypka and plaintiff Alvan Strasrypka as sellers and Byron J. Wilson as buyer, in which defendant Westport Funding Company now owns the buyer's interest, is hereby declared to be in full force and effect.

4. Defendant Westport is awarded judgment against plaintiffs, jointly and severally, as follows:

a. $487.98 damages.

b. $20,673.25 attorneys fees.

c. $503.50 costs.

for a total judgment of $21,664.73.

5. The clerk of the court is hereby ordered to release to plaintiffs all the funds currently held in trust, less $487.98, which the clerk of the court is hereby ordered to release to defendant Westport Funding Company to be applied against the judgment.

DATED this 19th day of November, 1993.

BY THE COURT:

Hon. Glenn K. Iwasaki

APPROVED AS TO FORM:

WILSON & WILSON

Donald R. Wilson
Donald Wilson
Attorneys for plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was sent via First Class mail on the 16th day of November, 1993 to the following:

Donald R. Wilson
WILSON & WILSON
5620 Highland Drive
Salt Lake City, Utah 84121

F:\lvf\strasrypka\judgment.pro